No. 92-1550

In The

Supreme Court of the United States

October Term, 1993

ABF FREIGHT SYSTEM, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF

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REPLY BRIEF

In the Brief For the National Labor Relations Board ("NLRB Brief"), Respondent is advocating uncertainty and vagueness on a legal duty that is essential to administration of justice. The NLRB and its amici have disregarded years of circuit court precedent supporting the common sense notion that deliberately false testimony should not be rewarded. On the issue of this case, the NLRB's preference for legal indeterminacy must yield to a firm admonition that deliberately false testimony calculated to affect the outcome of a case will not be condoned.

I.

DEFERENCE TO THE BOARD IS NOT WARRANTED

The NLRB and AFL-CIO argue at length that the Court should defer to the Board to decide when make-whole relief should be given to a discriminatee who lied to an administrative law judge. The Board is entitled to some deference in assessing industrial reality, but the circumstances of this case do not invoke the Board's special expertise. Far from it, as most every circuit court that has confronted the issue has commented, dealing with abuse of process seems to be a subject beyond the realm of NLRB comprehension. *See Precision Window Manufacturing Co. v. NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992) (citations omitted); *NLRB v. Mutual Maintenance Service Co., Inc.*, 632 F.2d 33, 39 (7th Cir. 1980).[1]

A. The Board's Wavering View Over The Years Renders Its Position Less Worthy Of Deference.

"An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). Although several references are made in the NLRB's Brief to "the Board's approach," that reference overstates the precedent. Analysis of NLRB

[1] In *Mutual Maintenance*, the Seventh Circuit refused to enforce an NLRB order that an employer reinstate with backpay an employee who committed unemployment compensation fraud. The court commented:

> The Board's cavalier treatment of this matter, in the face of ample precedent to the contrary, is simply inexcusable.

Id. at 39.

cases over the past many years reveals no approach lest it be an inconsistent one.

A chronological synopsis illustrates the point. First, in 1944 the Board held that "reinstatement would not effectuate the policies of the Act" because of the employee's lack of candor on the witness stand and his poor attendance record. *O'Donnell's Sea Grill*, 55 NLRB 818 (1944). Since the Board found that poor attendance was not the real reason why the employee was discharged, lack of candor is the only reason why the Board denied reinstatement.

Over the ensuing forty-four (44) years, the Board addressed false testimony by a prevailing discriminatee three times. *Iowa Beef Packers*, 144 NLRB 615 (1963), *enf. denied*, 331 F.2d 176 (8th Cir. 1964); *D V. Copying & Printing Inc.*, 240 NLRB 1276 (1979); and *Service Garage, Inc.*, 256 NLRB 931 (1981), *reversed*, 668 F.2d 247 (6th Cir. 1982). Not one of those cases resulted in an award of make-whole relief to a witness who deliberately gave false testimony on an issue in the case. In *IBP*, the Board simply overruled the ALJ's finding that the witness lied; in *D.V. Copying* the Board strongly condemned subornation of perjury by a charging party;[2] and *Service Garage* simply involved false testimony about one's age by a

[2] In *D.V. Copying & Printing Inc.*, 240 NLRB 1276 (1979), the Board was confronted with a prevailing charging party who knew that a witness on his behalf testified untruthfully. This was no grey area for the Board: it stated unequivocally that *suborning perjury* "alone constitutes deliberate and malicious conduct so calculated to abuse and undermine Board processes that the presence of an accompanying threat is unnecessary to toll the discriminatee's right [to backpay and reinstatement] as of the time of such conduct." *Id.* at 1276, n.2, *citing Iowa Beef Packers v. NLRB*, 331 F.2d 176 (8th Cir. 1964).

juvenile witness whose motive was to keep his job with another company.[3]

Finally, there is the Board's decision in *Owens-Illinois, Inc.*, 290 NLRB 1193 (1988), *enf'd without op.*, 872 F.2d 413 (3d Cir. 1989). This is the first time the Board held that false testimony on an issue in the case will not disqualify one from make-whole relief as long as most of the discriminatee's testimony is credited. 290 NLRB at 1193.[4]

The Board's approach becomes even murkier when cases involving falsification during the compliance phase of ULP proceedings and the after-acquired-evidence cases are considered. *American Navigation Co.*, 268 NLRB 426

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[3] The NLRB and AFL-CIO rely heavily on *Service Garage*, but that decision is consistent with denial of relief to Mr. Manso in this case. Had the youth's deception in *Service Garage* applied to an issue in the case, the inference to be drawn from the Board's decision is that back pay and reinstatement would be denied.

[4] Relying on *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S 645, 665-666 (1982), the Board contends that ABF waived the argument that Manso should have been denied relief under "the Board's approach" in *Owens* and *Lear-Siegler* because ABF did not raise that argument before the Board. (NLRB Brief, p. 21, n.14). Section 10(e) of the Act simply requires that objections to an issue be raised before the Board. ABF has objected to giving relief to Manso, because of his lie to the ALJ, at every phase since the hearing in Albuquerque. ABF did not waive application of Board law just because it did not cite the cases the Board likes. Section 10(e) simply requires that a party's exceptions be sufficiently specific to apprise the Board that an issue might be pursued on appeal. *See May Department Stores Company v. NLRB*, 326 U.S. 376, 386 (1945). As long as the issue is preserved for appeal, it is irrelevant that a specific argument relating to that objection is not raised before the Board. *See, e.g., Hospital & Service Employees Union v. NLRB*, 798 F.2d 1245, 1248 (9th Cir. 1986) (particular form of an argument concerning the issue of actual notice could be raised for the first time on appeal).

(1983), which figures prominently in the NRLB and AFL-CIO Briefs, holds that accrual of back pay stops when it is discovered that a discriminatee has willfully concealed interim earnings. The Board stated that "to award full backpay to a claimant who attempts to avert an order issued in the public interest into a scheme for unjustified personal gain *is to reward perfidy.*" *Id.* at 428 (emphasis added).[5] Seven years later, by contrast, the Board went further to hold that all backpay is denied when a discriminatee purposefully conceals interim earnings. *Overseas Motors, Inc.*, 291 NLRB 1086 (1990). Apparently, in the Board's view, perjury of facts relating to the merits can be rewarded, but perjury with regard to interim earnings cannot.

Plainly, the NLRB does not have a consistently held view on the consequences of abuse of process by prevailing discriminatees. The vague rationalization that each case turns on the Board's goal to effectuate the purposes of the Act is too loose to hold its varying decisions together. History rebuts any claim to special expertise the Board may raise on this issue.

B. Courts Have Not Deferred To The Board Where Its View About "Purposes Of The Act" Conflicts With Other Important Public Interests.

Most of the cases decided by the NLRB are strictly labor disputes that can be decided without reference to laws other than the NLRA or policies other than national labor policy. *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177

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[5] ULP cases are bifurcated as to liability and compliance. In contrast to the present case, which has not reached the compliance phase, the discriminatees' abuse of process in *American Navigation* and *Overseas Motors* occurred at the compliance phase after there was a final order granting make-whole relief.

(1941), and *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943), cited repeatedly in the NLRB Brief and AFL-CIO Brief, are good examples. The former case involved reimbursement for employee dues paid to a company created and dominated union, and the latter involved the right not to be denied employment simply because one belongs to a labor union. In neither case was there evidence of conduct by the employer or employee implicating legal duties or public interest additional to or separate from federal labor policy.

Judicial review of NLRB decisions is not solely to assure that the Board follows the Act, it is also to see that other equitable, legal, and policy considerations are properly taken into account. As stated in *NLRB v. Mutual Maintenance Service Co., Inc.*, 632 F.2d 33, 39 (7th Cir. 1990), "the National Labor Relations Act must not be enforced in a vacuum." This Court has often recognized that the NLRA must be applied in harmony with other rights, duties, and interests and that it is a function of the courts to correct the Board when its narrow focus on enforcement of the NLRA is blind to other considerations of law or public policy. (*See* Brief For Petitioner, pp. 26-30). Reinstating Michael Manso with full backpay has negative implications to law and policy beyond securing the right of employees to engage in protected concerted activity and thus deference to the Board is unwarranted.

C. Courts Have Not Deferred To The Board When It Has Acted Contrarily To Circuit Court Precedent.

The NLRB's Brief and those of its amici make an ostrich-like demurrer to the circuit court cases holding that a discriminatee who commits serious abuse of process is not entitled to reinstatement with backpay. (*See*

Brief for Petitioner pp. 15-18). Given that Congress has vested the courts of appeal with power to enforce or deny enforcement of NLRB orders, the Board is without authority to disregard judicial precedent established through review of Board decisions. *See NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987). A logical corollary is that an NLRB decision should not receive deference when it conflicts with a decision of a federal circuit court. As stated by the court in *NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119 (3d Cir. 1984):

> We have made it crystal clear that a Board's decision ignoring our precedents will not be enforced, * * * Congress has entrusted the power and authority to conduct judicial review in this court. That assignment is not a meaningless one; we do not propose to abdicate our responsibility to an administrative agency.

Id. at 128 (citations omitted). *See also NLRB v. HMO Intern.*, 678 F.2d 806, 809 (9th Cir. 1982) (Kennedy, J.). The Board's widely criticized policy of non-acquiescence to federal court precedent is ironic for an agency that has declined to exercise its rule-making authority in preference for setting policy by adjudication.[6]

II.

PETITIONER'S VIEW IS CONSISTENT WITH THE WEIGHT OF PRECEDENT

ABF's position is that backpay and reinstatement should be denied to witnesses found to have deliberately

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[6] The Board's authority to engage in rule-making is codified at 29 U.S.C. § 156.

given false testimony on an issue pertinent to a ULP case. (Brief For Petitioner, p. 3). All the Board and federal court decisions that address this issue, up until *Owens-Illinois, Inc.*, 290 NLRB 1193 (1988), *enf'd. without opinion*, 872 F.2d 413 (3d Cir. 1989), are consistent with ABF's position. In every instance where a prevailing discriminatee deliberately gave false testimony or suborned perjury, in an apparent effort to influence the outcome of the case, make-whole relief was denied.[7]

A. Respondent's Argument That Manso's Lie Is Immaterial Is Disingenuous

Michael Manso testified that he was late for work the day of his discharge because his car broke down and he had to call his wife to get out of bed, pick him up, and take him to work. That was a lie, as found by the ALJ. ABF told Manso he was being fired for tardiness. To say that testimony about the circumstances culminating in one's termination from employment is merely tangential to a ULP case challenging the termination is whimsical.

Michael Manso obviously thought his concocted story was material or he would not have made it up and testified about it. This is not a comparable situation to *Service Garage* where an underage employee lied about his age to avoid losing a job with another employer. No purpose other than to improve his odds of winning could possibly be served by Manso's lie.

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[7] *Iowa Beef Packers v. NLRB*, 331, F.2d 176 (8th Cir. 1964); *NLRB v. Apico Inns*, 512 F.2d 1171 (9th Cir. 1975); *NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975); *Precision Window Manuf. v. NLRB*, 963 F.2d 1105 (8th Cir. 1992); *NLRB v. Coca-Cola Bottling Co.*, 333 F.2d 181 (7th Cir. 1964); *O'Donnell's Sea Grill*, 55 NLRB 828 (1944).

Respondent and amici AFL-CIO irrationally contend that perjured testimony should be disrgarded if it ultimately does not change the outcome of the case. (NLRB Brief, pp. 21-22; AFL-CIO Brief, pp. 5-9). By that approach, witness dishonesty will be excused by the fortunate coincidence that the ALJ looked to other evidence to support her findings. Counsel for the Board and AFL-CIO make the generous assumption that witnesses, including those with a financial interest in the outcome, know precisely what facts will shape the judge's opinion and which ones will not.[8]

The measure should not be what facts ultimately turn out to be dispositive; rather, it should be whether the false testimony relates to a material issue in the case. When a charging party in a wrongful termination case testifies that he had a valid excuse or justification for the conduct cited by the employer as grounds for termination, as Manso did here, there can be no doubt that the testimony relates to a material issue in the case. (See Brief For The American Trucking Association As Amicus Curiae In Support Of Petitioner, pp. 8-9). As with any bright line there will be a penumbra, but that is far superior to the dim reproval of deliberately false testimony advocated by the NLRB and the AFL-CIO.

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[8] By the standard urged by Respondent and the AFL-CIO, the fact that a witness prevailed on the merits in an unfair labor practice case would necessarily mean that any false testimony given by the witness was not relevant and can be disregarded. The approach urged by Respondent and the AFL-CIO is circular and self-fulfilling.

B. Credited Testimony On Some Points Should Not Be An Offset For Deliberately False Testimony On Another Point.

If Moses was a member of the NLRB, the Ninth Commandment would have been edited to say "thou [generally] must not lie."[9] This comment is admittedly facetious, but so too must be the Board's contention that there should be no repercussions to perjury on a specific issue so long as the witness is credited on most of his testimony. (NLRB Brief, pp. 21-22). When Mr. Manso took the witness stand in Albuquerque, he was obligated to speak "the truth, the whole truth, and nothing but the truth" – not just some of the truth.

From 1944 when the situation was first encountered until 1988, no witness who sought to influence the outcome of a ULP case by false testimony was awarded make-whole relief. The Board may protest that all its decisions on the subject are linked by the common mission of enforcing the purposes of the Act, but reality is that the policy of measuring specific lies against the witnesses' overall testimony was first announced in *Owens-Illinois* late in the 1980s. This new approach by the Board is unaccompanied by meaningful standards and contemplates absurd results. For example, a discriminatee who testifies on one point only, and lies in doing so, would be judged more harshly than another discriminatee who repeats the lie but testifies credibly on other subjects. Measured against his overall testimony, the second witness' lie was less significant than the first witness' lie.

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[9] Exodus 20:16. Respondent presumably objects to this commandment as an undesirable bright line rule.

ABF submits that the Board got it right in *D.V. Copying & Printing Inc.*, 240 NLRB 1276 (1979). There, the Board said unequivocally that suborning perjury "alone constitutes deliberate and malicious conduct so calculated to abuse and undermine Board processes" as to mandate denial of make-whole relief. The Board was not concerned about a bright line then and should not be now.[10]

III.

THE OPTION TO REWARD FALSE TESTIMONY IS NOT NECESSARY TO SERVE PURPOSES OF THE ACT

The NLRB argues that it must be able to award backpay and reinstatement to discriminatees who lie on the witness stand both to deter future violations and to reassure incumbent employees that they are secure in their exercise of Section 7 rights. (NLRB Brief, pp. 29-30). That argument is hard to reconcile with the Board's ambiguous treatment of the false testimony issue over the years. If the only driving forces are deterrence of unfair labor practices and reassurance to employees, the Board

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[10] Another case where the Board correctly expressed intolerance toward overreaching conduct by a charging party is *Lear-Seigler Management Services Corp.*, 306 NLRB 393 (1992). There, the Board refused backpay and reinstatement to a charging party who threatened to report probation violations by a potential witness. ABF points out that "perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice." *See Nix v. Whiteside*, 475 U.S 157, 168 (1986) citing I. W. Burdick, Law of Crime §§ 293, 300, 318-336 (1946). Stated succinctly, if threatening a witness is sufficient reason for denying make-whole relief, and perjury is on par with threatening witnesses, then perjury is also sufficient reason for denying make-whole relief.

would never have withheld make-whole relief from prevailing discriminatees who lied. Besides the logical inconsistency between the Board's stated objectives and its actual practice, the premises underlying the Board's position are erroneous.

A. Reassurance to Incumbent Employees Need Not Be Accomplished Through Reinstatement Of An Employee Who Lied on the Witness Stand.

Both the NLRB and AFL-CIO fear that non-reinstatement of Manso or others like him would send a signal to co-workers that filing a charge with the Board is a high-risk proposition. (NLRB Brief, pp. 29-30; AFL-CIO Brief, p. 16). That concern can easily be addressed. The notice required by the Board as part of its remedial orders in ULP cases can include language explaining why the charging party has not returned to work. The Board could go further and direct the employer to meet with its employees or their representative to explain the circumstances of non-reinstatement. There is no reason why employees need be left to speculate.[11]

Another discrepancy in the Board's argument is timing. Years can pass between termination of an employee, filing of a charge, conducting a hearing, exhausting the administrative review process, appeal to the circuit court, and return to the NLRB Region for the compliance phase. By the time a charge runs its course employees are unlikely to question "why isn't so and so back?" When a charging party is eventually reinstated, the more likely question would be: "who is the new guy?" ABF and the

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[11] Notice posting and related remedies are discussed at pp. 19-26 of the Brief For Petitioner.

unions that have represented its employees for many years have tried to give employees a more effective and expeditious avenue of relief through contractual grievance procedures.

Yet another wrinkle in the Board's argument is the implication of a settlement. Unfair labor practice charges with and without merit are routinely settled by mutual compromise. Reinstatement is by no means a uniform feature of settlement agreements, even when the challenged employment practice was a discharge. When an employment discrimination charge, ULP charge, whistleblower claim, or other variety of wrongful discharge claim is settled without reinstatement, incumbent employees are left to draw the same inference or have the same concerns over which the NLRB now expresses concern.

B. Respondent's Belief That Make Whole Relief Is A Necessary Deterrent Is Unsupported And Myopic

The Board has adequate tools to deter employer unfair labor practices without awarding backpay and reinstatement to interested witnesses who abuse Board processes. (Brief For Petitioner, pp. 19-26). Although it now dismisses these tools as "prospective in nature" (NLRB Brief, p. 29), deterrence is by definition a prospective concept. Neither the NLRB nor its amici have by argument, evidence, or social studies shown that injunctions, notice posting, contempt orders and related remedies are ineffective at deterring commission of unfair labor practices. Conversely, there has been no showing that make-whole relief deters future ULP violations any more effectively than other forms of relief.

C. Respondent Is Incorrect In Arguing That Denial Of Make-Whole Relief To A Witness Who Lies Would Create A Double Standard

On pages 27-28 of the NLRB Brief, the argument is made that employers "suffer no sanction" if their witnesses lie "in an effort to avoid an unfair labor practice finding," but that discriminatees caught lying would be sanctioned if denied make-whole relief. That argument challenges reality.[12]

There are only three possibilities in the NLRB's hypothetical. On the one hand, if an employer representative is found to have lied on an issue relating to liability, the odds are overwhelmingly high that the employer is going to lose and relief consistent with NLRB practices will be assessed. In the unlikely event an ALJ concludes that an employer representative deliberately gave false testimony, but nevertheless determines that the employer did not commit an ULP, no relief can be ordered. There being no violation, there can be no remedy for an unfair labor practice.

The third situation is where findings are made that both the discriminatee and employer representative deliberately gave false testimony and a finding is made that the employer violated the Act.[13] To reiterate, it is just

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[12] ABF points out that culpability for false testimony does not transfer one-to-one between a corporation and an individual. Justice Scalia accurately pointed out in *St. Mary's* that individuals' actions are their own whereas corporations act through numerous individuals. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2754 (1993).

[13] The NLRB strongly and misleadingly argues that witnesses for ABF testified falsely. (NLRB Brief, p. 28). No such finding was made by the ALJ. Manso's lie is clear and undeniable and is a far cry from a judge's decision not to credit witness testimony. Credibility findings take into account faulty memory, confusion, misinterpretation or mistake: all of which occur without willful intent to deceive.

not true that withholding backpay and reinstatement in this context would let the employer off scott free. Significant and varied remedies remain at the Board's disposal. (Brief For Petitioner, pp. 19-26). Whether the dishonest charging party is compensated is irrelevant because, as the Board acknowledges, ULP remedies are not for his or her benefit (NLRB Brief, pp. 12-13).

To paraphrase, both the NLRB and AFL-CIO cite to *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993) in making the oversimplified observation: if employers can lie, why can't employees. (NLRB Brief, pp. 25, 28; AFL-CIO Brief, pp. 17-18). Their resort to *St. Mary's* is curious given the pain the NLRB has taken to downplay the relevance of other cases arising under Title VII. (NLRB Brief, p. 33, n.25). Whether or not Title VII precedent is generally relevant in unfair labor practices under the NLRA, however, *St. Mary's* did not involve a situation analogous to this case.

First, there was no finding in *St. Mary's* that the employer deliberately lied. The factfinder there concluded from circumstantial evidence that the articulated reasons for discharge were not the real reasons, but it did not make the specific and serious finding that the employer lied. 113 S. Ct. at 2748. This is not a technical distinction. *Id.* at 2754.

Second, the issue in *St. Mary's* was *not* the propriety of specific forms of relief, the issue was liability. Specifically, *must* a finding of intentional race discrimination

be made when the employer's stated reason for discharge is not credited? Concluding as the Court did that the answer is "no" does not support the proposition that employers who testify falsely can get away with a misdeed that employees cannot. Had the Court ruled otherwise, consistency would dictate that any time a claimant's testimony is not credited there must be a finding of no liability.

Third, the Board's concern with creating a double standard did not interfere with its prior decisions denying make-whole relief to discriminatees who testified falsely. *See O'Donnell's Sea Grill*, 55 NLRB 818 (1944); *D.V. Copying & Printing Inc.*, 240 NLRB 1276 (1979). Respondent's concern about inequities in treatment of dishonest employees compared to dishonest employers is academic in nature and not the product of a potential discrepancy in the law resulting from the Court's decision in this case. Employers whose testimony is discredited in a ULP case are odds-on bets to lose the case. A situation in which a discredited employer prevails in a ULP case is not unimaginable, but that is not the situation presently before the Court.[14]

IV.

ATTACKING PERJURY THROUGH SEPARATE PROCEEDINGS IS INEFFICIENT AND INEFFECTIVE

Echoing Justice Scalia's comment in *St. Mary's*, Respondent states that the NLRA is not a cause of action for perjury. (NLRB Brief, p. 25). True enough, but the

[14] In making its "double standard" argument, the Board has not cited a single case involving such a scenario. NLRB Brief, pp. 27-28.

analogy does not carry over. In *St. Mary's*, the Respondent was arguing that *liability* should be the consequence of discredited employer testimony. ABF agrees that liability should not automatically follow from testimony that is discredited; however, the point here is simply that one should not affirmatively benefit from an adjudicatory process he abused.

If the consequences of intentionally false testimony is not felt within the proceeding where the testimony was given, the only consequence likely to be felt is metaphysical. ABF has no civil action against Manso. There is no civil remedy for perjury and any claim the company might try would be preempted[15] and the futility of collection would further discourage resort to the courts.[16]

Perjury laws are rarely used to prosecute witnesses who lied in hearings before a federal administrative law judge. Manso has not been prosecuted, the Board did not refer his lie to the Justice Department for prosecution, and Respondent's struggle to cite contemporary examples of perjury prosecutions arising from ULP cases corroborates the inadequacy of this approach to addressing false testimony. None of the instances of NLRB referrals for prosecution involved charging parties or discriminatees who lied in ULP proceedings; and it seems unlikely that the NLRB staff would build a case around a witness' testimony and then turn the witness over to other authorities for perjury prosecution. (NLRB Brief, p. 27, n.19). Not just in the administrative hearing context, but in the

[15] See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Garner v. Teamsters*, 346 U.S. 485, 490-491 (1953).

[16] Any company that tried to sue a charging party for malicious prosecution, abuse of process, or any other civil wrong arising from testimony in an unfair labor practice case would undoubtedly face strenuous opposition from the Board.

justice system as a whole, the crime of perjury has been acknowledged throughout this century to be a largely under-prosecuted offense.[17]

Prevarication may be abundant, but prosecutorial and judicial resources are not. Saddling the criminal justice system with singular responsibility for discouraging misuse of civil and administrative proceedings is highly inefficient and ineffective. There always have been and always will be people willing to lie under oath, and minimizing this flaw in human nature takes alot more than the remote possibility of prosecution.

V.

THE ISSUE IN THIS CASE HAS IMPLICATIONS BEYOND ENFORCEMENT OF THE NLRA

Decisions by this Court have a force and prominence unshared by the work of any other court or agency of government. Whether drafted narrowly or in sweeping terms, holdings and explanations in Supreme Court decisions inevitably are seized upon by lawyers advocating varied propositions in far ranging contexts. Supreme Court decisions are also relied on by judges in state and federal court as precedent and as guidance for resolving policy debates where precedent is lacking or unclear. Further, to a degree not even approximated by any other tribunal, this Court's decisions reach the public and

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[17] *See generally*, Servada, *Accomplices in Federal Court: A Case For Increased Evidentiary Standards*, 100 Yale L.J. 785, 788 (1990); Comment, *Perjury the Forgotten Offense*, 65 J. Crim. L. Criminology 361 (1974), *citing*, Report of the President's Commission on Law Enforcement and Administration of Justice; The Challenge Of Crime In A Free Society 374 (1968); Purrington, *The Frequency of Perjury*, 8 Colum. L. Rev. 67, 70 (1908).

shape our understanding and appreciation of the rule of law.

The Supreme Court's supervisory role over the administration of justice in the federal system does not depend on a statutory mandate. *See McNabb v. United States*, 318 U.S. 332, 341 (1943); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Formulating principles and rules to aid in eliciting the truth and applying the law are basic to the Supreme Court's position at the helm of the Judicial Branch of government. This case presents the Court with an opportunity as supervisor of the federal adjudicatory system to emphasize that correct and consistent application of law depends on a front line where individuals called upon to testify have every conceivable incentive to tell the truth.

Petitioner's final point concerns respect and appreciation. Law is a social contract and effective performance of the contract depends on strong, uniform, unwavering acceptance of its premises. One of those premises, core to application of law, is that witnesses sworn to tell the truth must do so.

Lawyers have been targets of scorn since long before Dick The Butcher's comment in *Henry VI*. Now the distrust is spreading as the litigation system itself suffers widespread public skepticism. A 1991 poll by the National Opinion Research Center, for example, revealed that 27% of adult Americans have "very little confidence" or "no confidence at all" in the courts and the legal system. Only 25% have a "great deal of confidence" (19%) or "complete cofidence" (6%).[18] Litigation abuse and once unfathomable verdicts are a common subject in the news

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[18] National Opinion Research Center, General Social Survey (Nexis, Access No. 0192114, Question 33, October 1991).

media, non-fiction books, popular television and cinema, and everyday conversation. Making Michael Manso a winner despite his attempt to deceive judge and employer would further erode confidence in the legal system. A forceful and unequivocal message that those who avail themselves of the federal adjudicatory system must honor its rules is needed and this case presents a good opportunity to deliver that message.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Brief for Petitioner, ABF Freight System, Inc. respectfully requests that the decision of the Tenth Circuit not be enforced.

Respectfully submitted,

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